Supreme Court, U.S.
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No. 02-1221

IN THE

Supreme Court of the United States

UNITED STATES SHOE CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* AIR PRODUCTS AND CHEMICALS, INC., CLARK OIL TRADING COMPANY, DAIDO STEEL (AMERICA), INC., FEDERAL SIGNAL CORPORATION, THE GERBER PRODUCTS COMPANY, THE MELTON COMPANY, PERSECO ASIA-PACIFIC, L.L.C., ROBERT BOSCH TOOL CORPORATION, TENNECO AUTOMOTIVE INC., AND VARIAN MEDICAL SYSTEMS, INC. IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Did the United States violate the Takings Clause of the U.S. Constitution by retaining interest earned on the money it exacted from exporters pursuant to the unconstitutional Harbor Maintenance Tax?

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INTEREST OF *AMICI CURIAE*

Air Products and Chemicals, Inc., Clark Oil Trading Company, Daido Steel (America), Inc., Federal Signal Corporation, The Gerber Products Company, The Melton Company, Perseco Asia-Pacific, L.L.C., Robert Bosch Tool Corporation, Tenneco Automotive Inc., and Varian Medical Systems, Inc., *amici curiae* in this appeal, respectfully submit this brief in support of U.S. Shoe Corporation ("U.S. Shoe").[1]

Air Products and Chemicals, Inc. is a Delaware corporation. It serves customers in technology, energy, healthcare and industrial markets worldwide with a unique portfolio of products, services and solutions, providing atmospheric gases, process and specialty gases, performance materials and chemical intermediates.

Clark Oil Trading Company is a Missouri general partnership. It trades, transports and stores petroleum and petroleum products in various markets.

Daido Steel (America), Inc. is a Delaware corporation. It is the exclusive sales agent of Daido Steel Co., Ltd. in the United States. Daido Steel Co., Ltd. is one of the world's largest specialty steel producers.

Federal Signal Corporation is a Delaware corporation. It is a manufacturer and worldwide supplier of safety, signaling and communications equipment, fire rescue

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1. Petitioner has filed a global consent to the submission of *amicus curiae* briefs in support of either party, which is on file with the Clerk. Respondent's letter consenting to the filing of this brief accompanies this filing. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

products, street sweeping and vacuum loader vehicles, parking control equipment, carbide and superhard tipped cutting tools, precision metal stamping punches and components for plastic injection molds.

The Gerber Products Company is a Michigan corporation. In 1994, it merged with Sandoz Ltd. and is now a part of the Novartis group of companies. It is one of the world's leading baby food and products companies.

The Melton Company is a Texas corporation. It is a leading U.S. processor of lambskins.

Perseco Asia-Pacific, L.L.C. is a Delaware Limited Liability Company. It provides purchasing services for packaging products for the McDonald's restaurants system.

Robert Bosch Tool Corporation is a Delaware corporation. It is one of the world's premier power tool makers.

Tenneco Automotive Inc. is a Delaware corporation. It is one of the world's largest designers, manufacturers and distributors of automotive ride control and emission control products and systems for the automotive original equipment market, and the repair and replacement market, or aftermarket.

Finally, Varian Medical Systems, Inc. is a Delaware Corporation. It is one of the world's leading manufacturers of radiotherapy systems.

As significant U.S. exporters who have paid collectively Harbor Maintenance Taxes in excess of $4.8 million, *amici curiae* have an interest in the outcome of this appeal. *Amici curiae* agree with the Petitioner that the United States owes interest on the money it exacted pursuant to the unconstitutional Harbor Maintenance Tax.

SUMMARY OF ARGUMENT

The Fifth Amendment of the U.S. Constitution states that private property shall not "be taken for public use without just compensation." The Federal Circuit, in *United States Shoe Corporation v. United States*, 296 F.3d 1378 (2002), rejected plaintiff's argument that the government's refusal to refund interest on the Harbor Maintenance Tax ("HMT") exactions violated the Fifth Amendment, finding that interest on the refunds was not a private property interest protected by the Takings Clause. The Federal Circuit stated that the interest, like the HMT itself, became the property of the government upon payment and, therefore, was not an unconstitutional taking.

This Court's precedent, however, establishes that the interest earned on monies wrongfully exacted from taxpayers constitutes private property for purposes of the Takings Clause. The fact that the underlying statute instituting the HMT was found to be unconstitutional further warrants a finding of a taking by the government. "Just compensation" in this case consists, at a minimum, of the income earned by the government from the interest-bearing account into which the HMT was deposited. Support also exists for the remedy of interest on the funds paid by exporters, calculated from the date of their deposit at the statutory rate for interest on refunds of taxes and customs duties (*see* 26 U.S.C. § 6621).

Finally, in addition to the arguments set forth above, the Court should grant U.S. Shoe's petition for a writ of certiorari because of the disagreement among the federal courts of appeals over this issue.

ARGUMENT

A. The Money Earned as Interest on the HMT Qualifies as a Property Interest of U.S. Shoe.

For the Court to determine that the interest on the HMT retained by the government is a taking in violation of the Takings Clause of the Fifth Amendment, it must first be established that the interest qualifies as a property interest that is constitutionally protected. *See Ruckelhaus v. Monsanto Co.*, 467 U.S. 986, 1000-01 (1984).

The Court has established that the earnings of a fund such as that at issue in *U.S. Shoe* constitute a property interest for purposes of the Takings Clause. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), a company known as Eckerd's agreed to purchase Webb's Fabulous Pharmacies, Inc. but discovered at closing that Webb's debts appeared to be greater than the purchase price. To protect itself, and as allowed under Florida statute, Eckerd's interpleaded Webb's and Webb's creditors and tendered the purchase price to the Florida court. The clerk of the court charged a fee based on a percentage of the amount deposited for its services in connection with its receipt of the money into the registry of the court. The interest earned on the interpleader fund, which eventually totaled over $100,000, was not turned over to the receiver and it served as the basis of the action against Seminole County. The Supreme Court held that the retention of the interest was a taking which violated the Takings Clause of the Fifth Amendment.

Like the interest earned on the interpleader fund in *Webb's*, the interest in *U.S. Shoe* constitutes a property interest. The Court's characterization of the Florida court's refusal to refund the interest in *Webb's* is instructive:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish

> the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.

Id. at 164.

The Federal Circuit in *U.S. Shoe* held that the HMT payment was not held by the government as a property of U.S. Shoe, but became the property of the government upon payment into the Harbor Maintenance Fund. The mere payment of the taxes into the HMT fund, according to the court, transformed the HMT paid into the property of the government, thereby extinguishing the private property interest of the exporters in the funds. *U.S. Shoe*, 289 F.3d at 1384. The Court, however, dismissed such an attempt by the Florida court in *Webb's*:

> [A] State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Webb's, 449 U.S. at 164.

The Court similarly rejected a state's appropriation of earned interest in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). In that case, Texas established a trust account into which an attorney must deposit client funds for

limited periods of time, and the normal interest earned on the funds was paid to a public foundation that finances legal services for low-income persons. The Court rejected the differing treatment of confiscatory regulations and those regulating property interests. "[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Id.* at 167. Without deciding the ultimate issue of whether the retention of the interest was a taking without just compensation, the *Phillips* Court determined that the interest on the deposited legal funds was the private property of the client for purposes of the Takings Clause.

The decisions in *Webb's* and *Phillips* clearly establish that the earned interest at issue in *U.S. Shoe* constitutes private property. As in *U.S.* Shoe, the statutes in each of these cases required the parties to remit funds to the government which were in turn held in interest-bearing accounts.

The property interest in *U.S. Shoe* is even more compelling than the interests at issue in *Webb's* and *Phillips* because the underlying statute in *U.S. Shoe* mandating the HMT on exportations was found to be unconstitutional. To withhold the payment of earned interest on HMT funds when the collection of the tax was deemed unconstitutional, but to grant the refund of interest when the underlying statute was lawful (as in *Webb's* and *Phillips*) would be a travesty of justice rewarding the government for its unconstitutional acts.

The Federal Circuit in *U.S. Shoe* unconvincingly distinguished the property interests found in *Webb's* and *Phillips* from that at bar. Citing *Phillips*, the court concluded that "[f]or the accrued interest to rise to the level of private property, the principal must be held in an identified private account." *U.S. Shoe*, 296 F.3d at 1384. The monies deposited into the Harbor Maintenance Trust Fund, according to the

court, were not held by the government as property of the claimants but, rather, "became the property of the Treasury upon payment." Thus, the court held, any interest earned on the remitted funds also became the property of the government.

The Federal Circuit's requirement that the funds be "held" by the government as property of U.S. Shoe is without precedent. The Takings Clause protects an interest that *is* private property, not one that is *held* as private property. The holding of the HMT money by the government as its own in *U.S. Shoe* is no different from the holding of the funds by the state in *Webb's*. The government in both cases retained earned interest that it never lawfully possessed. The only difference between the cases – *viz.*, that the state in *Webb's* laid claim unjustifiably to a *temporary* property right in the money, whereas the government in *U.S. Shoe* laid claim unjustifiably to a *permanent* property right in the money – is plainly without significance. To conclude otherwise would privilege particularly egregious violations of property rights over merely wrongful violations of those rights.

It is irrelevant that the export exactions were commingled in the Harbor Maintenance Trust Fund with the money reaped from the valid HMT on imports. The statute enacting the HMT directed that the export fees must be placed in the Harbor Maintenance Trust Fund, which is a discrete interest-bearing account. Like the HMT fees, the interest on the taxes paid is sufficiently identifiable in the fund for purposes of refunding it to exporters. It is important to note that the interest at issue in *Webb's* and *Phillips* was similarly commingled with the principal of the corresponding funds and was not maintained by the state governments in separate and discrete accounts.

B. The Unlawful Exaction Constitutes a *Per Se* Taking Rather Than a Regulatory Taking.

The U.S. Supreme Court has recognized two different categories of takings under the Takings Clause of the Fifth Amendment, a "*per se* taking" (also referred to as a "classic taking") and a "regulatory taking." In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court described a *per se* taking as one in which "the government directly appropriates private property for its own use," and a regulatory taking as one in which the government's "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[2]

The retention of interest earned by the government qualifies as a *per se* taking because the government held the monies in the Harbor Maintenance Trust Fund for its own use. The Court has held that the retention of interest is a *per se* taking in two other cases with takings similar to that in *U.S. Shoe*. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In contrast, the government's appropriation of the interest was not "some public program adjusting the benefits and burdens of economic life to promote the common good" and, therefore, does not qualify as a regulatory taking.

The Supreme Court's decision in a recent case provides further compelling support that the retention of the interest on the money in the Harbor Maintenance Trust Fund was a

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2. In determining a "regulatory taking," the Court considers three factors: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 123-24 (1978).

per se taking rather than a regulatory taking. In *Brown v. Legal Foundation of Washington*, 2003 WL 1523550 (U.S. 2003), the Court completed its decision that began as *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), concerning the payment of interest earned on clients' funds while those funds are held in attorneys' trust ("IOLTA") accounts. In *Brown*, the Court determined that if the act of giving the interest to the Washington Legal Foundation was a taking, then it was a *per se* taking. The Court reasoned that since "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal," transfer of the interest to the Legal Foundation of Washington constituted a physical taking subject to a *per se* analysis. *Id.* at *11, quoting *Phillips*. Accordingly, the government's taking of the interest earned on the Harbor Maintenance Trust Fund is a *per se* taking that requires just compensation.

C. Because the Supreme Court has Ruled the HMT Unconstitutional, the Court Should Disregard the Law Authorizing the Collection of the Fee and Hold that the Retained Interest Violates the Takings Clause.

Prior to the Court finding the HMT unconstitutional, the government collected the HMT and deposited the funds in an interest-bearing account. Once this Court struck down the HMT, the government's retention of the interest earned without just compensation from the date that the interest began accruing violated the Takings Clause. As Justice Scalia wrote in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995) (Scalia, J. concurring):

> [W]hat a court does with regard to an unconstitutional law is simply to *ignore* it. It decides the case '*disregarding the [unconstitutional] law*,'

> because a law repugnant to the Constitution 'is void, and is as no law.' Thus, if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy.

Id. at 760. *See also Norton v. Shelby County*, 118 U.S. 425, 442 (1886); *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 320 (1987); and *Alexander v. Cockrell*, 294 F.3d 626, 630 (5th Cir. 2002).

Thus, the Federal Circuit's refusal in *U.S. Shoe* to compensate exporters for the interest on the HMT funds is without merit. The unconstitutional law instituting the HMT was void from the moment of its enactment, and the government should have ignored the law from that point for purposes of determining just compensation for the taxpayers. The Federal Circuit's failure to recognize the interest as U.S. Shoe's property and authorize its refund reveals the court's great deference to the unconstitutional law itself. The court should have, instead, treated the HMT as a tax that never existed and acknowledged that U.S. Shoe never relinquished its property right in the HMT funds remitted, or the interest on the funds.

D. *U.S. Shoe* Must Receive Just Compensation for the Government's Taking of the Interest on the HMT.

The Takings Clause of the Fifth Amendment requires that "private property [must not] be taken for public use without just compensation." *U.S. Const. amend. V.* Thus, if the Court finds that the interest on the HMT qualifies as a property interest that has been taken unconstitutionally by the government, the government must provide "just compensation" for the taking.

The Court has routinely found that when there is a taking under the Fifth Amendment, the plaintiff must be compensated beyond the principal amount that was taken by the government. *See, e.g., Albrecht v. United States*, 329 U.S. 599 (1947) "[W]here payment of that fair market value is deferred, it has been held that something more than fair market value is required to make the property owner whole, to afford him 'just compensation'." *Id.* at 602. The term "just compensation" was interpreted by the Court in *Webb's, supra*, to equal the actual interest earned on monies that were unlawfully taken and held by the government. In the case of U.S. Shoe, the government deposited the HMT into an interest-bearing account and tens of millions of dollars have been earned on the funds to date. The government should not be allowed to retain the profits earned on a tax that was unconstitutionally imposed and coercively collected.

A compelling argument can be made that, to make U.S. Shoe "whole," the government must refund interest for the period extending from the date that HMT was collected to the date of refund. The Federal Circuit in *U.S. Shoe* acknowledged: "[t]he principle that the 'just compensation' language includes the payment of interest from the time of the taking is long standing." (*citing Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923)). Regardless of the method employed to calculate interest in this case, it is incontrovertible that the government must make the plaintiff whole by refunding interest on the HMT funds that were unlawfully exacted.

The Court's refusal to refund the interest earned on the IOLTA trust accounts in *Brown, supra*, does not dictate the result in this case. In *Brown*, the Court ruled that the plaintiffs were not deprived of "just compensation" because such compensation would amount to nothing after the costs of

paying it had been expended.[3] Clearly, because the actual interest earned on the HMT far exceeds the administrative costs of refunding that money, *U.S. Shoe* is governed by *Webb's* rather than by *Brown*. Accordingly, the government took the interest earned on the HMT collected from *U.S. Shoe* without paying the company just compensation.

E. The Court Should Grant U.S. Shoe's Petition for a Writ of Certiorari Because the Federal Courts of Appeals are Split in Their Enforcement of the Takings Clause.

The circuit courts have differed in their interpretation of the Supreme Court's decisions in *Webb's* and *Phillips* when considering whether prisoners are entitled to the interest earned on trust accounts into which their personal funds are deposited. The Ninth Circuit has found a property interest in the interest earned by prisoners that was unconstitutionally taken by the government. The Fourth and Tenth Circuits, however, have reached the opposite conclusion.

In *Schneider v. California Department of Corrections*, 151 F.3d 1194 (9th Cir. 1998), the Ninth Circuit considered the constitutionality of the State of California's refusal to refund to prisoners the interest earned on personal monies deposited into a trust fund during their incarceration. Relying specifically on *Webb's* and *Phillips*, the court held that the inmates "possess a constitutionally recognizable property interest that triggers Takings Clause scrutiny." *Id.* at 1201.

The Fourth Circuit specifically acknowledged its divergence from the Ninth Circuit in *Schneider* when it refused, for purposes of the Takings Clause, to recognize as

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3. In *Brown*, the interest earned on the IOLTA funds attributable to a client was such a nominal amount that the administrative cost of refunding the interest exceeded any interest earned.

private property interest earned on prison inmate accounts. In *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000), the appeals court found that the interest at issue was not a private property interest at common law but, instead, was an interest created by statute. "His property interest was that given by statute, and the State never took from him what was created by statute. Therefore, there was not a taking of private property as addressed in the Fifth Amendment." *Id.* at 186.

The Tenth Circuit similarly rejected plaintiff's claim of a constitutionally protected property interest under the Takings Clause with respect to interest on prison inmate funds. "[B]ecause neither Oklahoma state law nor any other 'independent source' provide Mr. Petrick a constitutionally protected property interest in interest earned on funds in his draw or mandatory savings accounts, his claim must fail." *Petrick v. Fields*, 1996 U.S. App. LEXIS 313338, at 7 (10th Cir. 1996).

Although U.S. Shoe's petition does not present a question identical to the issue regarding which the circuits are split, the resolution of the question presented by U.S. Shoe would resolve the disagreement among the courts of appeals. For this reason, the Court should agree to hear *U.S. Shoe*. The Ninth Circuit's finding of a constitutionally protected property interest in *Schneider* is the holding most in accord with the Supreme Court's decisions in *Webb's* and *Phillips*. The Fourth and Tenth Circuits' findings that state law limited the plaintiffs' property interest in the income generated from the prison inmate funds directly contradicts the Supreme Court's refusal to allow a state to circumvent the Takings Clause "by recharacterizing the principal as 'public money.'" *Webb's*, 449 U.S. at 164.

CONCLUSION

For the reasons stated above, *amici curiae*, Air Products and Chemicals, Inc., Clark Oil Trading Company, Daido Steel (America), Inc., Federal Signal Corporation, The Gerber Products Company, The Melton Company, Perseco Asia-Pacific, L.L.C., Robert Bosch Tool Corporation, Tenneco Automotive Inc., and Varian Medical Systems, Inc. respectfully request that the Court reverse the lower court's judgment that the exporters which deposited HMT, found to be unconstitutional by the Court, are not entitled to interest on the HMT refunds.

Respectfully submitted,

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